

Order

Michigan Supreme Court
Lansing, Michigan

August 5, 2009

Marilyn Kelly,
Chief Justice

ADM File No. 2008-39

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

Proposed Amendments of
Rules 6.425 and 6.610 of the
Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.425 and 6.610 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

Rule 6.425 Sentencing; Appointment of Appellate Counsel

- (A) [Unchanged.]
- (B) Presentence Report; Disclosure Before Sentencing. The court must provide copies of the presentence report to the prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days, before the day of sentencing. The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain their copies for their records. If the presentence report is not made available to the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment of the day of sentencing to enable the defendant's lawyer, or the defendant if not represented by a lawyer, to review the presentence report and to prepare any necessary corrections, additions, or deletions to present to the court. The presentence report shall not include the following information about any

victim or witness: home address, home telephone number, work address, or work telephone number, unless an address is used to identify the place of the crime. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review.

(C)-(G) [Unchanged.]

Rule 6.610 Criminal Procedure Generally

(A)-(E) [Unchanged.]

(F) Sentencing.

(1) ~~At the~~ For sentencing, the court shall:

- (a) require the presence of the defendant's attorney, unless the defendant does not have one or has waived the attorney's presence;
- (b) give the defendant's attorney or, if the defendant is not represented by an attorney, the defendant an opportunity to review the presentence report, if any, and to advise the court of circumstances the defendant believes should be considered in imposing sentence; ~~and~~
- (c) inform the defendant of credit to be given for time served, if any; and
- (d) if a presentence report was prepared, the court must provide copies of the presentence report to the prosecutor, and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two business days, before the day of sentencing. The prosecutor and the defendant's lawyer, or the defendant if not represented by a lawyer, may retain their copies for their records. If the

presentence report is not made available to the defendant's lawyer, or the defendant if not represented by a lawyer, at least two business days before the day of sentencing, the defendant's lawyer, or the defendant if not represented by a lawyer, shall be entitled, on oral motion, to an adjournment to enable the defendant's lawyer, or the defendant if not represented by a lawyer, to review the presentence report and to prepare any necessary corrections, additions, or deletions to present to the court. The presentence report shall not include the following information about any victim or witness: home address, home telephone number, work address, work telephone number, or any other information prohibited from disclosure pursuant to MCL 780.751 et seq., unless an address is used to identify the place of the crime.

(G)-(H) [Unchanged.]

CORRIGAN, J. (*dissenting*). I would not publish the proposed amendment of MCR 6.425 and 6.610 because I am concerned that the language recommended by the State Bar promotes asymmetry in the motions made available to defendants and prosecutors regarding untimely presentence reports and because the recommended language may run afoul of an existing statute mandating that presentence reports be privileged communications. Although I do not oppose increasing the amount of time in which courts must provide copies of presentence reports, I would have addressed these drafting deficiencies before submitting the proposed amendment for public comment.

Proposed MCR 6.425(B) and MCR 6.610(F)(1)(d) both state that if a presentence report is not made available at least two business days before sentencing, “the defendant’s lawyer (or the defendant if not represented by a lawyer) shall be entitled, on oral motion, to an adjournment.” The purpose of allowing defendants or their attorneys to request an adjournment is so that defendants can “review the presentence report and [] prepare any necessary corrections, additions or deletions to present to the court.” The recommended language in both rules, however, entirely excludes prosecutors from moving for an adjournment if a presentence report has not been made available to them at least two business days before the date of sentencing. I question what rationale, if any, undergirds this disparity between the motions made available to prosecutors and the motions made available to defendants concerning untimely presentence reports. Both prosecutors and defendants should be able to request an adjournment because both parties should carefully review an individual’s presentence report and apprise the court of any inaccuracies or necessary changes. Consequently, I would correct this asymmetry in the recommended language of proposed MCR 6.425(B) and MCR 6.610(F)(1)(d).

Moreover, I am concerned that insofar as the proposed amendment of MCR 6.425(B) and MCR 6.610(F)(1)(d) provides that the prosecutor, the defendant's attorney, or the defendant "may retain their copies [of the presentencing report] for their records," it may run afoul of MCL 791.229.¹ According to MCL 791.229, a presentence report "shall be privileged or confidential communications not open to public inspection." MCL 791.229. Additionally, the Legislature specified that only "[j]udges and probation officers shall have access to the records, reports, and case histories." *Id.* As privileged communications, presentence reports are subject to disclosure to necessary parties set forth in MCR 6.425(B) and (C). MCR 6.425(B) provides that the court may exempt "information or a diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality." The same material is exempt if copies of the report are later provided to the parties named in MCR 6.425(C). Importantly, however, neither MCR 6.425(B) nor MCR 6.425(C) states that the prosecutor or the defendant shall retain their copies of the presentence report for their records.² The statutory confidentiality afforded a presentence report under MCL 791.229 explains why such reports traditionally are not made part of the circuit court file. Moreover, it explains why in cases where the report must be

¹ MCL 791.229 provides that:

All records and reports of investigations made by a probation officer, and all case histories of probationers shall be privileged or confidential communications not open to public inspection. Judges and probation officers shall have access to the records, reports, and case histories. The probation officer, the assistant director of probation, or the assistant director's representative shall permit the attorney general, the auditor general, and law enforcement agencies to have access to the records, reports, and case histories and shall permit designated representatives of a private vendor that operates a youth correctional facility under [MCL 791.220g] to have access to the records, reports, and case histories pertaining to prisoners assigned to the youth correctional facility. The relation of confidence between the probation officer and probationer or defendant under investigation shall remain inviolate.

² I acknowledge that MCR 6.425(C) provides in relevant part, "[a]fter sentencing, the court, on written request, must provide the prosecutor, the defendant's lawyer, or the defendant not represented by a lawyer, with a copy of the presentence report and any attachments to it." Notably, MCR 6.425(C) does not include any language mandating that the parties who request a copy of a presentence report after sentencing shall retain that copy for their personal records.

transmitted to the Court of Appeals, the presentence report is not made a part of the public record there either.³ Accordingly, I would delete the portion of the proposed amendment that allows the prosecutor and the defendant to retain their copies of the defendant's presentence report.

Because I believe that this Court should have addressed these drafting deficiencies before submitting the proposed amendment of MCR 6.425 and 6.610 for public comment, I respectfully dissent from the publication of the proposed amendment.

YOUNG and MARKMAN, JJ., concur with CORRIGAN, J.

Staff Comment: The proposed amendments of Rules 6.425 and 6.610 of the Michigan Court Rules were submitted by the Representative Assembly of the State Bar of Michigan and would increase the time within which a court is required to provide copies of the presentence report to the prosecutor, the defendant's lawyer, or the defendant if not represented by a lawyer, to two business days before the day of sentencing. If the report is not made available at least two days before sentencing, the defendant's lawyer, or the defendant, if not represented by a lawyer, would be entitled to adjournment to prepare necessary corrections, additions, or deletions to present to the court. The proposed revisions of these rules also would prohibit the inclusion of specific information in the report about the victim or witness.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by December 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-39. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

³ A presentence report must be sent to the Court of Appeals only if a sentencing issue is being raised on appeal. MCR 7.212(C)(7). Similarly, MCL 769.34(8)(b) states that the presentence report shall be part of the record filed for an appeal of a sentence, except that any exempted portion shall not be made a part of the public record.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 5, 2009

Corbin R. Davis
Clerk